

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PROPOSED	)	NOTICE OF RULES HEARING
AMENDMENT OF SDCL 15-26A-6	)	
AMENDMENT OF SDCL 16-18-2.2	)	NO. 119
AMENDMENT OF SDCL 16-18-2.3	)	
AMENDMENT OF SDCL 16-18-2.4	)	
AMENDMENT OF SDCL 16-18-2.5	)	
AMENDMENT OF SDCL 16-18-2.7	)	
AMENDMENT OF SDCL 16-18-2.9	)	
AMENDMENT OF SDCL 19-15-1	)	
AMENDMENT OF SDCL 19-15-2	)	
AMENDMENT OF SDCL 19-15-3	)	
AMENDMENT OF SDCL 19-15-4	)	
PROPOSED ADOPTION OF A NEW RULE AS	)	
BOTH A RULE OF CIVIL PROCEDURE AND	)	
CRIMINAL PROCEDURE	)	
PROPOSED ADOPTION OF A NEW RULE AS A	)	
RULE OF EVIDENCE	)	
PROPOSED ADOPTION OF A NEW RULE TO	)	
NUMBER THE SOUTH DAKOTA RULES OF	)	
EVIDENCE TO CONFORM TO THE FEDERAL	)	
RULES OF EVIDENCE	)	
PROPOSED ADOPTION OF A NEW RULE TO	)	
ADOPT FEDERAL RULES OF EVIDENCE 412	)	
CONCERNING THE RELEVANCE OF PAST	)	
SEXUAL BEHAVIOR OF AN ALLEGED VICTIM	)	
IN SEX OFFENSE CASES (FEDERAL RAPE	)	
SHIELD LAW)	)	
PROPOSED ADOPTION OF A NEW RULE TO	)	
ADOPT FEDERAL RULE OF EVIDENCE 705,	)	
DISCLOSURE OF FACTS OR DATA	)	
UNDERLYING EXPERT OPINION	)	
PROPOSED ADOPTION OF A NEW RULE TO	)	
ADOPT FEDERAL RULE OF EVIDENCE 807	)	
REGARDING THE RESIDUAL EXCEPTION AND	)	
TO TRANSFER INTO THE RULE § 19-16-28	)	
AND § 19-16-35	)	

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Petitions for amendments of existing sections of the South Dakota Codified Laws and the adoption of new rules having been filed with the Court, and the Court having determined that the proposed amendments and adoptions should be noticed for hearing, now therefore,

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 17, 2010, at 1:15 P.M., C.S.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

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1. **Amendment of SDCL 15-26A-6. Appeals—When Taken.** ~~Except as provided in § 15-26A-6.1,~~ An appeal from a judgment or order must be taken within thirty days after the judgment or order shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party.

A written notice of appeal filed before the attestation and filing of such signed judgment or order shall be deemed as filed on the date of the attestation and filing of the judgment or order.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the circuit court by any party pursuant to § 15-6-59 or § 15-6-50(b), or both, and the full time for appeal fixed by this section commences to run after the order made pursuant to such motion shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party or if the circuit court fails to take action on such motion or fails to enter an order extending the time for taking action on such motion within the time prescribed, then the date shall be computed from the date on which the time for action by the circuit court expires.

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2. **Amendment of SDCL 16-18-2.2. Requirements for participation by law student.**

In order to make an appearance and to participate pursuant to §§ 16-18-2.1 to 16-18-2.10, inclusive, the law student must:

(1) Be duly enrolled in or a graduate of the school of law of the University of South Dakota or a law school approved by the American Bar Association.

(2) Have completed legal studies amounting to at least four semesters or the equivalent if the school is on some basis other than a semester basis.

(3) Be certified by the dean of such law school as being of good moral character and competent legal ability, and as being adequately trained to perform as a legal intern. As a part of the certificate the dean shall set forth the termination date of the certificate. No certificate shall remain in effect in excess of eighteen months after it is filed.

(4) Be introduced to the court or administrative agency in which he or she is appearing as a legal intern by a lawyer authorized to practice law in this state.

(5) Neither ask nor receive any compensation or remuneration of any kind for his or her services from the person on whose behalf he or she renders services, but this shall not prevent a lawyer, legal aid bureau, law school, public defender agency, or the state from paying compensation to the legal intern, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

(6) Certify in writing that he or she has read and is familiar with the rules of professional conduct of the Supreme Court of South Dakota, this title and the provisions of §§ 19-13-2 to 19-13-5, inclusive, and agree to govern his or her conduct accordingly. Such certification shall either be made part of or shall be annexed to the certification of the dean of the law school as required by subdivision (3) of this section.

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**3. Amendment of SDCL 16-18-2.3. Certification of legal intern by law school dean--Filing--Effective period--Withdrawal by dean or termination by Supreme Court.**

The certification pursuant to § 16-18-2.2 by the law school dean of a law student to become and perform as a legal intern:

(1) Shall be filed with the clerk of the Supreme Court and the Secretary of the Board of Bar Examiners and, unless it is sooner withdrawn, it shall remain in effect until the expiration of the term fixed by the certificate of the dean, or until the announcement by the Board of Bar Examiners of this state of the results of the first bar examination following the student's graduation, whichever is earlier. Provided, that as to any student who passes such examination, ~~or for whom such examination is waived pursuant to the former § 16-16-6.1,~~ the certification shall continue in effect until the date he or she is admitted to practice law pursuant to § 16-16-17; but such continuation shall not exceed three months. However, any student who fails such examination on the first occasion may apply to the dean of such law school and obtain, upon a showing of good cause in good faith, an extension certificate until the results of the next bar examination are announced. The Board of Bar Examiners announces the results of the bar examination by letter to the student informing him or her that s/he passed or failed the examination.

(2) May be withdrawn by the dean at any time by mailing a notice to that effect to the secretary of the Board of Bar Examiners and the clerk of the Supreme Court, which shall be filed by the clerk. Such withdrawal may be without notice or hearing and without any showing of cause.

(3) May be terminated by the Supreme Court at any time without notice or hearing and without any showing of cause. Notice of termination shall be filed with the clerk of the court.

(4) May be withdrawn by the Board of Bar Examiners if the law student is being investigated by the Board of Bar Examiners due to character and fitness issues. Such withdrawal may be without notice or hearing and without showing of cause.

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**4. Amendment of SDCL 16-18-2.4. Consent and approval for appearance by legal intern--Authority for appearance in civil and criminal matters.**

A legal intern may appear and participate in any proceeding in any court or before any administrative agency in this state on behalf of any person in the following matters and under the following circumstances:

(1) In any civil matter. In such matters the a supervising lawyer shall certify to the court or the administrative agency, orally or in writing, that the client has consented to the appearance of the legal intern. ~~The A supervising lawyer is not required to be personally present in court or before the administrative agency at each appearance by a legal intern. if the supervising lawyer certifies to the court or the administrative agency, orally or in writing, that the client consents to his or her absence.~~

(2) In any criminal or quasi-criminal matter, and whether the defendant does or does not have the right to the assignment of counsel under any constitutional provision, statute, or rule of the Supreme Court of this state or of the United States. In such matters the client shall consent in writing and the a supervising lawyer shall approve in writing the appearance by the legal intern and the supervising lawyer shall be personally present throughout the proceedings. ~~; provided, however, in matters where the proceedings do not involve a critical stage, the legal intern may appear in the absence of the supervising lawyer and without such written consent and approval if the supervising lawyer certifies to the court, orally or in writing, that the client has consented to such appearance by the legal intern.~~

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**5. Amendment of SDCL 16-18-2.5. Appearance by legal intern for state, county, or first or second class municipality.**

A legal intern may appear in any civil, criminal, or quasi-criminal matter on behalf of the state, a county, or a first or

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second class municipality with the written approval of the attorney general, state's attorney, or city attorney, as the case may be. The legal intern shall be under the supervision of the approving attorney, or of a deputy or assistant thereof, who has the responsibility as supervising lawyer. The approval may be for a specific case or matter or may be general for a series or type of cases or matters as appears in order to the approving attorney. The approval may be withdrawn at any time by the approving attorney without notice, hearing, or cause stated; and the withdrawal shall be filed pursuant to § 16-18-2.8. ~~Unless the court orders otherwise,~~  
The appearance by the legal intern may must be in the absence presence of the supervising approving lawyer.

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**6. Amendment of SDCL 16-18-2.7. Oral argument by legal intern before Supreme Court.**

A legal intern may participate in oral argument before the Supreme Court but only in the presence of ~~the~~ a supervising lawyer who shall certify to the court in his or her introduction of the legal intern to the court that the client has approved the participation by the legal intern.

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**7. Amendment of SDCL 16-18-2.9. Qualifications of supervising lawyer--Professional responsibility.**

A supervising lawyer under whose supervision a legal intern does any of the things permitted by §§ 16-18-2.4 to 16-18-2.7, inclusive, shall be a lawyer authorized to practice law in this state, and:

(1) Shall be approved by the dean of the school of law of the University of South Dakota or by the director of the clinical law program of the school of law; and such approval by the dean or the director may be general, may have time, scope, or case limitations, or may be on an ad hoc case by case basis; all such as the dean or the director shall from time to time determine. The approval may be modified or withdrawn by the dean or the director at any time without notice or hearing and without any showing of cause.

Such approval shall be in writing except that at the option of the dean or the director the approval may be oral for all matters relating to the clinical law program.

(2) Shall assume personal professional responsibility for the conduct of the legal intern.

(3) Shall appear with the legal intern in all court or administrative agency proceedings.

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**8. Amendment of SDCL 19-15-1. (Rule 701) ~~Opinions and inferences of~~ Opinion testimony by lay witnesses.**

If the witness is not testifying as an expert, ~~his testimony~~ the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness, ~~and~~

(2) Helpful to a clear understanding of ~~his testimony~~ the witness' testimony or the determination of a fact in issue; and

(3) Not based on scientific, technical, or other specialized knowledge within the scope of § 19-5-2.

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**9. Amendment of SDCL 19-15-2. (Rule 702) Opinions Testimony of by experts admissible.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data,

(2) The testimony is the product of reliable principles and methods, and

(3) The witness has applied the principles and methods reliably to the facts of the case.

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**10. Amendment of SDCL 19-15-3. (Rule 703) ~~Factual basis for expert opinions~~ Bases of opinion testimony by experts. The facts or**

data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to ~~him~~ the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

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**11. Amendment of SDCL 19-15-4. (Rule 704) Opinion on ultimate issue.**

(1) Except as provided in subdivision (2), Testimony testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(2) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

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**12. PROPOSED ADOPTION OF A NEW RULE AS BOTH A RULE OF CIVIL PROCEDURE AND CRIMINAL PROCEDURE.**

The record of any hearing, court trial or jury trial shall consist of the transcript prepared by an official court reporter or court recorder or freelance reporter on contract with the Unified Judicial System and the exhibits offered in evidence.

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**13. PROPOSED ADOPTION OF A NEW RULE AS A RULE OF EVIDENCE.**

The only transcript of any hearing, court trial or jury trial admissible in evidence shall be that prepared by an official court

reporter or court recorder or freelance reporter on contract with the Unified Judicial System.

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**14. PROPOSED ADOPTION OF A NEW RULE TO NUMBER THE SOUTH DAKOTA RULES OF EVIDENCE TO CONFORM TO THE FEDERAL RULES OF EVIDENCE.**

In order to conform the South Dakota Rules of Evidence to the Federal Rules of Evidence SDCL Ch. 19-9 through SDCL Ch. 19-18 would need to be renumbered. Currently, those chapters contain references to the federal rules through a parenthetical reference. However, the adoption of the federal numbering system would simplify the ability to research and cross-reference decisions under those rules.

Although the number of rules impacted is too voluminous to list here, the proposal is to consolidate chapters 19-9 to 19-18 into a new chapter, 19A-1. The internal citations would then be organized in accord with the federal rules. For instance, 19-1-1 would become 19A-1-101, 19-1-2 would become 19A-1-102 etc. in accord with the federal numbers. Currently, chapter 19-9 contains the 100 series of the federal rules, 19-10 contains the 200 series of the federal rules and so on under the federal rules. By renumbering them all so the last number in the code citation corresponds to the federal rule it would simplify research and put the evidence rules into one chapter.

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**15. PROPOSED ADOPTION OF A NEW RULE TO ADOPT FEDERAL RULES OF EVIDENCE 412 CONCERNING THE RELEVANCE OF PAST SEXUAL BEHAVIOR OF AN ALLEGED VICTIM IN SEX OFFENSE CASES (FEDERAL RAPE SHIELD LAW).**

Section 1. That chapter 19-12 be amended by adding thereto a NEW SECTION to read as follows:

**SDCL 19-12-\_\_\_ (Rule 412). Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition.**

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual

predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of

the hearing must be sealed and remain under seal unless the court orders otherwise.

Section 2. The adoption of this rule shall only become effective upon the legislative repeal of § 23A-22-15 and § 23A-22-15.1.

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**16. PROPOSED ADOPTION OF A NEW RULE TO ADOPT FEDERAL RULE OF EVIDENCE 705, DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION.**

Section 1. That chapter 19-15 be amended by adding thereto a NEW SECTION to read as follows:

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Section 2. That 19-15-5.1 be repealed.

~~19-15-5.1. (Rule 705(a)) Expert opinion admissible without hypothetical question. Cross examination. An expert witness may be asked to state his opinions or inferences, whether these opinions or inferences are based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which these opinions or inferences are based. An expert witness may be required, on direct or cross-examination, to specify the data on which his opinions or inferences are based.~~

Section 3. That 19-15-5.2 be repealed.

~~19-15-5.2. (Rule 705(b)) Report of impartial expert admissible though based on information furnished by others. A written report or finding of facts prepared by an expert not being a party to the cause, nor an employee of a party, except for the purpose of making such report or finding, nor financially interested in the result of the controversy, and containing the conclusions resulting wholly or partly from written information furnished by the cooperation of~~

~~several persons acting for a common purpose, shall, in so far as the same may be relevant, be admissible when testified to by the person, or one of the persons, making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report or finding is based, if in the opinion of the court, no substantial injustice will be done the opposite party.~~

Section 4. That 19-15-6 be repealed.

~~19-15-6. (Rule 705(c)) Notice to opponent of report of impartial expert--Inspection rights. The report or finding described in § 19-15-5.2 shall not be admissible unless the party offering it shall have given notice to the adverse party a reasonable time before trial of his intention to offer it, together with a copy of the report or finding, or so much thereof as may relate to the controversy, and shall also have afforded him a reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control, on which the report or finding was based, and also the names of all persons furnishing facts upon which the report or finding was based, except that it may be admitted if the trial court finds that no substantial injustice would result from the failure to give such notice.~~

Section 5. That 19-15-7 be repealed.

~~19-15-7. (Rule 705(d)) Cross examination of person furnishing information for impartial expert report. Any person who has furnished information on which the report or finding described in § 19-15-5.2 is based may be cross examined by the adverse party, but the fact that his testimony is not obtainable shall not render the report or finding inadmissible, unless the trial court finds that substantial injustice would be done to the adverse party by its admission.~~

Section 6. That 19-15-8 be repealed.

~~19-15-8. (Rule 705(e)) Citation of uniform act. Sections 19-15-5.2 to 19-15-8, inclusive, may be cited as the Uniform Composite Reports as Evidence Act.~~

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17. PROPOSED ADOPTION OF A NEW RULE TO ADOPT FEDERAL RULE OF EVIDENCE 807 REGARDING THE RESIDUAL EXCEPTION AND TO TRANSFER INTO THE RULE § 19-16-28 AND § 19-16-35.

Section 1. That chapter 19-16 be amended by adding thereto a NEW SECTION to read as follows:

§ 19-16- (Rule 807) Residual Exception. A statement not specifically covered by §§ 19-16-5 to 19-16-8, inclusive, or §§ 19-16-9 to 19-16-34, inclusive, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by § 19-16-4, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of chapters 19-9 to 19-18, inclusive, and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Section 2. That §19-16-28 be repealed.

~~19-16-28. (Rule 803(24)) Other hearsay admissible despite availability of declarant. Criteria for admission: Advance notice to opponent. A statement not specifically covered by any of §§ 19-16-5 to 19-16-27, inclusive, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by § 19-16-4, even though the declarant is available as a witness, if the court determines that:~~

- ~~(1) The statement is offered as evidence of a material fact;~~
- ~~(2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and~~

~~(3) The general purposes of chapters 19-9 to 19-18, inclusive, and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this section unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

Section 3. That § 19-16-35 be repealed.

~~19-16-35. (Rule 804(b)(6)) Other hearsay admissible if declarant unavailable Advance notice to opponents. A statement not specifically covered by any of §§ 19-16-30 to 19-16-34, inclusive, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by § 19-16-4 if the declarant is unavailable as a witness and if the court determines that:~~

~~(1) The statement is offered as evidence of a material fact;~~  
~~(2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and~~

~~(3) The general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.~~

~~However, a statement may not be admitted under this section unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

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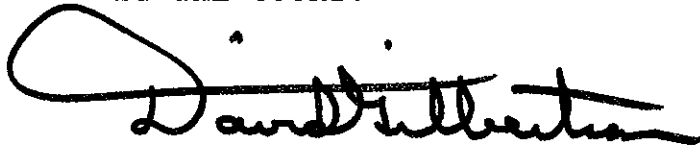
Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and the original and ten copies thereof filed with the Clerk of the Supreme Court no later than February 10, 2010.

Subsequent to the hearing, the Court may reject or adopt the proposed rule or any rule germane to the subject thereof.

Notice of this hearing shall be made to the members of the State Bar by publication of this notice in the January 2010, State Bar Newsletter.

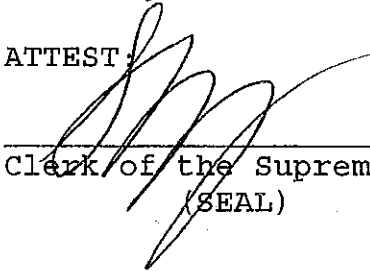
DATED at Pierre, South Dakota this 29th day of December, 2009.

BY THE COURT:



David Gilbertson, Chief Justice

ATTEST:

  
\_\_\_\_\_  
Clerk of the Supreme Court  
(SEAL)

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

DEC 29 2009

  
Clerk